Supreme Court, U.S.
FILED
APR 19 2010
OFFICE OF THE CLERK

(2)

No. 09-1128

# In the Supreme Court of the United States

DANIEL J. SEGAL,

*Petitioner*,

v.

FIFTH THIRD BANK, N.A., et al.,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF IN OPPOSITION

PATRICK F. FISCHER
*Counsel of Record*
JOSEPH M. CALLOW
RACHAEL A. ROWE
BRIAN P. MUETHING
KEATING MUETHING & KLEKAMP PLL
ONE EAST FOURTH STREET
SUITE 1400
CINCINNATI, OH 45202
TEL: 513-639-3814
FAX: 513-579-6457
pfischer@kmklaw.com

*Counsel for Respondents*

April 19, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800 890 5001

## *Question Presented*

**Whether the Court should grant the Petition when the Sixth Circuit's Opinion affirming the dismissal of Petitioner's Amended Complaint as preempted by the Securities Litigation Uniform Standards Act of 1998: (a) faithfully applied the language of the statute and established precedent from this Court; (b) is entirely consistent with a well-established body of cases confronting the same and similar issues from various District and Circuit Courts of Appeals; and (c) does nothing to interfere in state trust law.**

## Table of Contents

Question Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... iv

Introduction ..... 1

Statement ..... 3

I. Reasons for Denying the Petition ..... 6

A. The Opinion is Entirely Consistent with Binding Precedent from this Court and Does Not Expand the Well-Settled Scope of SLUSA. ..... 7

B. There is No Circuit Split Related to the Application of *Dabit* and SLUSA Preemption that Could Justify Granting the Petition. . 14

1. Contrary to Petitioner's Claim, There is No Split Among the Circuits Concerning Whether Detrimental Reliance is an Element of SLUSA Preemption. ..... 14

2. There is No Circuit Split Regarding a Plaintiff's Right to Artfully Plead Around SLUSA ..... 20

3. This Case Does Not Present a Circuit Split on Whether SLUSA Preempts Individual Claims or Entire Actions .. 23

C. The Sixth Circuit's Decision Does Not Interfere With State Trust Law ..... 26

Conclusion ..... 28

## Table of Authorities

***Cases***

*Anderson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
521 F.3d 1278 (10th Cir. 2008) ..... 15, 23

*Arnold v. Bank of America, N.A.*,
129 S.Ct. 598 (2008) ..... 12, 13

*Beckett v. Mellon Investor Servs., LLC*,
No. 06-36044, 2009 U.S. App. LEXIS 10335 (9th Cir. May 14, 2009) ..... 21

*Behlen v. Merrill Lynch*,
311 F.3d 1087 (11th Cir. 2002) ..... 21

*Blue Chip Stamps v. Manor Drug Stores*,
421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975) ..... 8, 9

*Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
395 F.3d 25 (2d Cir. 2005) ..... 8

*Dudek v. Prudential Sec.*, Inc.,
295 F.3d 875 (8th Cir. 2002) ..... 20

*Felton v. Morgan Stanley Dean Witter* & Co.,
429 F. Supp. 2d 684 (S.D.N.Y. 2006) ..... 21

*Gavin v. AT&T Corp.*,
464 F.3d 634 (7th Cir. 2006) ..... 17

*Green v. Ameritrade*,
279 F.3d 590 (8th Cir. 2002) ..... 15, 16, 17

*In re Lord Abbett Mut. Funds Fee Litig.*,
463 F. Supp. 2d 505 (D.N.J. 2006) ..... 25

*In re Lord Abbett Mut. Funds Fee Litig.*,
553 F.3d 248 (3d Cir. 2009) ..... 24

*Kutten v. Bank of America*,
530 F.3d 669 (8th Cir. 2008), *cert. denied Arnold v. Bank of America, N.A.*, 129 S.Ct. 598, 172 L.Ed.2d 456, 77 USLW 3130 (Nov. 17, 2008) ..... 2, 12, 13, 17

*LaSala v. Bordier et Cie*,
519 F.3d 121 (3d Cir. 2008) ..... 19

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*,
547 U.S. 71 (2006) ..... *passim*

*Miller v. Nationwide Life Ins. Co.*,
391 F.3d 698 (5th Cir. 2004) ..... 20, 23

*Proctor v. Vishay Intertechnology, Inc.*,
584 F.3d 1208 (9th Cir. 2009) ..... 18, 25

*Rabin v. JP Morgan Chase Bank, N.A.*,
No. 06 C 5452, 2007 WL 2295795 (N.D. Ill. Aug. 3, 2007) ..... 12

*Ring v. AXA Fin., Inc.*,
483 F.3d 95 (2d Cir. 2007) ..... 18

*Rowinski v. Salomon Smith Barney Inc.*,
398 F.3d 294 (3d Cir. 2005) ..... 20

*Rubin v. Reinhard*,
08cv1820-WQH-JMA, 2009 U.S. Dist. LEXIS 25543 (S.D. Cal. Mar. 25, 2009) ..... 25

*SEC v. Zandford*,
535 U.S. 813 (2002) ..... 10, 11, 22

*Siepel v. Bank of America, N.A.*,
526 F.3d 1122 (8th Cir. 2008) . 12, 13, 16, 17, 20

*Sofonia v. Principal Life Ins. Co.*,
465 F.3d 873 (8th Cir. 2006) ..... 17

*Spencer v. Wachovia Bank, N.A.*,
No. 05-81016, 2006 WL 3408043 (S.D. Fla. May 10, 2006) ..... 13

*Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*,
552 U.S. 148 (2008) ..... 16

*Stoody-Broser v. Bank of America N.A.*,
No. C 08-02705 JSW, 2009 WL 2707393 (N.D. Cal. Aug. 25, 2009) ..... 12

*U.S. Mortgage, Inc. v. Saxton*,
494 F.3d 833 (9th Cir. 2007) ..... 21, 22, 27

*U.S. v. O'Hagan*,
521 U.S. 642 (1997) ..... 10

*Wells Fargo Bank, N.A. v. Superior Court of San Francisco County*,
71 Cal.Rptr.3d 506 (Cal. App. 2008) ..... 13

***Statutes***

15 U.S.C. § 77p(b) ..... 8

15 U.S.C. § 78bb(f)(5)(B)(i)(I) ..... 25

***Rules***

Sup. Ct. R. 10 ..... 1

## *Introduction*

The Sixth Circuit determined that Petitioner's Amended Complaint was preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). The Petitioner asks this Court to review that decision but fails to present any "compelling reasons" that would support granting his Petition for a Writ of Certiorari ("Petition") should be granted. *See* Sup. Ct. R. 10.

The Petition mischaracterizes the Sixth Circuit's decision as a dramatic and impermissible expansion of this Court's decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006). Petitioner claims that the Sixth Circuit extended the scope of SLUSA beyond the intent of Congress and to preempt any state law claim that touches a security in any way. But this is not remotely what the Sixth Circuit said. Rather, the Sixth Circuit applied the language of the statute, stating that any alleged wrongdoing must be "in connection with" the purchase or sale of a security; further stated that *Dabit* teaches that the "in connection with" clause of the statute must be construed "flexibly"; and concluded that the "in connection with" standard was met where all of the wrongdoing alleged in the Amended Complaint "depends" on securities transactions. The Sixth Circuit's decision did not expand the scope of preemption at all; instead, it simply applied the statute and settled law to the allegations in Petitioner's Amended Complaint. This limited decision does not require or justify this Court's review.

Petitioner argues that the Opinion establishes a split among Circuit Court of Appeals on a number of

issues. But Petitioner's description of the post-*Dabit* SLUSA jurisprudence and scope bears little resemblance to reality. First, the Petition fails to disclose that the Opinion joined a long and unbroken line of similar cases; numerous courts have held that SLUSA preempts a claim by trust beneficiaries alleging improper investment in affiliated mutual funds. The Court declined to review one of these decisions just eighteen months ago. *Kutten v. Bank of America*, 530 F.3d 669 (8th Cir. 2008), cert. denied *Arnold v. Bank of America, N.A.*, 129 S.Ct. 598, 172 L.Ed.2d 456, 77 USLW 3130 (Nov. 17, 2008) (NO. 08-333). Second, in attempting to manufacture a circuit split, the Petitioner misstates the holdings of numerous decisions which, when described accurately, fully support the Sixth Circuit's decision and offer no evidence of conflict among the circuits on an important matter.

Finally, Petitioner claims that the Opinion improperly infringes on state trust law and leaves Petitioner without a remedy for Fifth Third's alleged wrongdoing. In *Dabit*, this Court rejected the argument that SLUSA was an improper interference on state law. Moreover, as recognized by the Court in *Dabit* and the lower courts in this matter, SLUSA does not actually preempt any claim, including any of Petitioner's potential claims; SLUSA only restricts the use of the class action procedural device regarding certain claims in connection with securities transactions. Even if class claims in a complaint are preempted by SLUSA, Plaintiffs like Petitioner have multiple paths to pursue a possible remedy under *Dabit* and the Sixth Circuit's Opinion. As this is an issue already settled by the Court in *Dabit*, there is no reason to review the Opinion.

Respondent respectfully requests that the Court deny the Petition.

## *Statement*

Petitioner Daniel J. Segal ("Segal" or "Petitioner") is or was a beneficiary of certain trusts. *See* R. 17, Amended Complaint ¶ 45. Respondent Fifth Third Bancorp ("Respondent," "Fifth Third" or "the Bank") formerly served as the trustee of those trusts. The Bank invested a portion of the trust funds in various mutual funds affiliated with Fifth Third.

On May 1, 2007, Daniel J. Segal filed a Class Action Complaint on behalf of himself, his minor children, and two putative classes.[1] R. 1.[2] Fifth Third moved to dismiss the complaint on the basis of SLUSA preemption. In doing so, Fifth Third highlighted the many allegations of misrepresentations and omissions of material fact that supported SLUSA preemption. Alerted to the deficiencies of the complaint, and in a further attempt to avoid SLUSA, Petitioner filed an Amended Class Action Complaint (the "Amended Complaint"). R. 17. While Petitioner edited or removed certain words and phrases contained in the

---

[1] Because it helps to reveal the true nature of the claims asserted in this action, Petitioner seeks to downplay or hide the original complaint filed in this case. To do so, Petitioner begins his discussion of the procedural history of this action with the filing of the Amended Complaint and then defines the Amended Complaint as "Complaint." Pet 6, *see also* Pet. 8 (removing the word "Amended" from the quotation from the Opinion)

[2] References to "R. __" shall refer to the District Court docket, 1:07-cv-348 (S.D. Ohio).

original complaint, the causes of action and gravamen of the Amended Complaint remained the same.[3]

The Amended Complaint asserted state law claims for breach of contract, unjust enrichment, and breaches of fiduciary duties. According to its terms, the gravamen of the Amended Complaint "is that the defendants did not deal honestly, ethically, fairly, and/or in good faith with Fifth Third's beneficiaries." R. 17, Am. Compl. ¶ 6. The alleged wrongdoing described in the Amended Complaint specifically relates to Fifth Third's investing the trust funds it managed in its affiliated mutual funds.

For example, the Amended Complaint alleges that Fifth Third offered and promoted individualized trust administration. *See e.g.* R. 17, Am. Compl. ¶¶ 10, 25, 27-29, 35. Petitioner alleges that instead of making appropriate investments for each trust and providing individualized service, that Fifth Third instead misled Petitioner by only providing standardized investment of trust accounts in the Fifth Third Funds. *Id.*

Petitioner also alleges that Fifth Third breached its state-law duty of loyalty by placing its own interests ahead of the beneficiaries when investing in the Fifth Third Funds. *See e.g.* R. 17, Am. Compl. ¶ 21. Plaintiff also claims that by investing fiduciary accounts in the Fifth Third Funds, Fifth Third improperly collected fees for both the administration of the fiduciary

---

[3] *See* D. Ct. Order, Pet. App. 18a (Upon Fifth Third's motion to dismiss the original complaint, "Plaintiffs elected to amend, and removed most of the direct allegations of 'misrepresentations,' 'omissions,' and 'schemes.'")

accounts and the administration of the Fifth Third Funds (referred to by Petitioner as "double dipping") again, in violation of state law. *See* R. 17, Am. Compl. ¶ 30.

Fifth Third moved to dismiss the Amended Complaint on the basis of SLUSA preemption. R. 22. On March 25, 2008, the District Court dismissed the class claims with prejudice. R. 30, District Court Order, Pet. App. 12a-25a (hereafter "D. Ct. Order"). The District Court found that the class claims in the Amended Complaint were based on a central factual allegation: "that Fifth Third misrepresented or failed to disclose material facts, and/or engaged in a manipulative or deceptive course of conduct, when Fifth Third invested Plaintiffs' fiduciary funds into the Bank's proprietary mutual funds. That allegation is clearly the gravamen of Plaintiffs' state law claims." D. Ct. Order, Pet. App. 18a. The District Court appropriately looked past the labels utilized by Plaintiff to determine the true gravamen of the allegations. D. Ct. Order, Pet. App. 19a. The District Court held that this alleged conduct was "in connection with" the purchase of Fifth Third mutual funds. D. Ct. Order, Pet. App. 25a. Because the allegations of the Amended Complaint showed that diversity jurisdiction was lacking on the individual claims, the District Court dismissed the Petitioner's individual claims without prejudice. *Id.*

On appeal, the Sixth Circuit affirmed the District Court. Opinion, Pet. App. 1a-11a. The Opinion found that the Amended Complaint alleges misrepresentations, material omissions, and manipulation, and identified numerous examples of each. Opinion, Pet. App. 5a. The Opinion also held

that these allegations not only "coincide" – the operative word from *Dabit* for analyzing the "in connection with" prong of SLUSA – with securities transactions, but that the claims in the Amended Complaint "depend" on the purchase of the Fifth Third mutual funds. Opinion, Pet. App. 6a.

The Opinion below rejected many of the arguments Petitioner asserts here. Specifically, the Opinion held that the applicability of SLUSA does not turn on the presence (or absence) of any specific prohibited word, but rather on whether "the complaint covers the prohibited theories, no matter what words are used (or disclaimed) in explaining them." Opinion, Pet. App. 7a-8a. The Opinion, relying on *Dabit*, also rejected Petitioner's contention that SLUSA prohibits claims only if the allegations would otherwise give rise to an actionable federal securities claim. Opinion, Pet. App. 8a. Finally, the Opinion overruled Petitioner's claim that applying SLUSA to his Amended Complaint improperly eliminated any remedy beneficiary might have against a fiduciary like Fifth Third. Opinion, Pet. App. 10a.

After the Opinion was issued, Petitioner requested en banc reconsideration by the Sixth Circuit. That request was denied. Pet. App. 26a.

### *I. Reasons for Denying the Petition*

The decision below applied the plain text of the SLUSA statute and this Court's recent decision in *Dabit* to the specific factual allegations in the Amended Complaint. In doing so, the Sixth Circuit joined numerous other courts that have found claims arising in the exact same context – claims concerning

the investment of trust assets in that financial institution's affiliated mutual funds – to be preempted by SLUSA. By any measure, the relevant legal issues are well settled. The Sixth Circuit's (correct) application of these settled principles does not present a compelling or important issue for the Court to review.

### A. The Opinion is Entirely Consistent with Binding Precedent from this Court and Does Not Expand the Well-Settled Scope of SLUSA.

In 1995, Congress became concerned with "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. In response Congress passed the Private Securities Litigation Reform Act ("PSLRA"), which imposes heightened pleading requirements upon, and other procedures concerning such actions. The passage of the PSLRA had an unintended consequence, as some members of the plaintiffs' bar began to avoid the federal forum altogether and file actions under state law. *Dabit*, 547 U.S. at 82. To close this loophole, and to "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PSLRA, Congress enacted SLUSA. *Id.*

SLUSA preemption applies when: (1) the complaint presents a covered class action, which means it involves more than fifty members; (2) the claims are based on state law; (3) the action involves a "covered security"; and (4) the complaint alleges "an untrue statement or omissions of a material fact in connection

with" the purchase or sale of a security or a "manipulative device or contrivance in connection with" purchasing or selling a covered security. 15 U.S.C. § 77p(b); Opinion, Pet. App. 4a; Pet. 13. That SLUSA applies on a showing of the foregoing is undisputed; both the Petitioner and the Opinion below refer to the exact same factors. *Id.*

As to these factors in the present case, the Opinion correctly notes that the first three are not in dispute; even Petitioner agrees that those factors are met in this case. Opinion, Pet. App. 4a-5a. Only the fourth factor – whether the Amended Complaint contains allegations of misrepresentations, omissions of material fact, or manipulation in connection with the purchase of the Fifth Third funds – is at issue. *Dabit* controls the analysis of this final factor in the SLUSA analysis.

In *Dabit*, a former Merrill Lynch stock broker filed a state-law class claim alleging that his employer fraudulently caused him and others to hold onto overvalued securities. 547 U.S. at 75. The Second Circuit held that the claim was not preempted, concluding that the standing limitations placed on a private securities action plaintiff in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975), form the outer bounds of SLUSA preemption. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005). Thus, because the class in *Dabit* consisted of "holders" of securities, but not purchasers or sellers that might have standing to pursue a § 10(b) claim, the Second Circuit held that the action fell outside SLUSA preemption. *Id.*

This Court reversed, holding that "in connection with" must be given a "broad interpretation" consistent with prior consideration of that phrase by the Court. *Dabit*, 547 U.S. at 85. In doing so, the Court rejected an alternate construction of "in connection with" that would have limited the scope of SLUSA preemption, as the Second Circuit did, based on the elements of a private right of action under § 10(b) of the Exchange Act of 1934 and Rule 10b-5. *Id.* at 84-86. The Court held that the policy-based standing limitations from *Blue Chip Stamps* did not limit the scope of SLUSA's preemptive effect. Noting that the Supreme Court's interpretation of "in connection with" was well established at the time SLUSA was enacted, in *Dabit* this Court stated, "Congress can hardly have been unaware of the broad construction adopted by both this Court and the SEC when it imported the key phrase – 'in connection with the purchase or sale' – into SLUSA's core provision." *Id.* at 85. The Court also held that interpreting SLUSA narrowly would undercut the effectiveness of the PSLRA and run contrary to SLUSA's stated purpose. *Id.* at 86.

In light of the Court's decision in *Dabit*, Petitioner's principal legal contentions are simply unsupportable. For example, Petitioner claims that SLUSA only preempts claims resting on allegations of deception inducing a particular investment decision, or claims concerning the purchase or sale of a security in reliance on misrepresentations, omissions, or acts of deception or manipulation. *See, e.g.*, Pet. 14, 16, 18-27. But the fraud alleged in a plaintiff's complaint does not have to induce a purchase or be relied on by the plaintiff; in fact, the plaintiff does not have to make the securities purchase at all (in reliance on the

alleged fraud or not). *Id.* at 84-88. As this Court unequivocally stated in *Dabit*:

> Under our precedents, it is enough that the fraud alleged "coincides" with a securities transaction - whether by the plaintiff or by someone else. . . . The requisite showing, in other words, is 'deception in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller.

*Id.* at 85 (citing *U.S. v. O'Hagan*, 521 U.S. 642, 658 (1997)).

Moreover, Petitioner contends that SLUSA preclusion only applies when a defendant's conduct would constitute a violation of securities law. Pet. 14. But this is not the law, and Petitioner offers no citations that suggest otherwise. Rather, *Dabit* undeniably confirms that the scope of SLUSA preemption is broader than a claim under § 10(b), for in *Dabit* the plaintiffs were holders, and could not meet the purchaser or seller requirement to bring a private action under federal securities laws. *Dabit*, 547 U.S. at 84-87.

*SEC v. Zandford*, 535 U.S. 813 (2002) confirms that the Sixth Circuit applied the "in connection with" doctrine in a manner entirely consistent with this Court's prior interpretations of that phrase. In *Zandford*, the SEC brought a civil action against a broker for violations of § 10(b) and Rule 10b-5. The broker had sold all of his clients' securities and diverted the sale proceeds to his own accounts. The district court entered judgment against the broker, but the Fourth Circuit reversed, agreeing with the broker

that his actions were not "in connection with" the sale of his clients' securities. Instead, the Fourth Circuit held that the broker's scheme to steal his client's money was only "incidental" to any sale of securities. *Id.* at 817-18.

This Court unanimously reversed and held that the broker engaged in an ongoing scheme to defraud the clients and that the fraud "coincided with the sales themselves" and "each sale was made to further [the broker's] fraudulent scheme." *Id.* at 820. The Court found that the fact that clients did not rely on the fraud was irrelevant to whether the "in connection with" requirement was not for the purpose of SLUSA preemption. Indeed, the clients did not even know about the scheme at the time of the securities sales, and yet the Court held that each transaction was "deceptive because it was neither authorized by, nor disclosed to" the brokers clients. *Id.* at 821. The Court therefore found that the "in connection with" requirement was satisfied.

In the Opinion below, the Sixth Circuit applied this Court's clear interpretation of the "in connection" with" requirement and found that it was satisfied based on Petitioner's Amended Complaint. Not only did the alleged wrongdoing "coincide" with the purchase of the Fifth Third mutual funds, the Sixth Circuit stated, but the causes of action "depend" on such purchases. Opinion, Pet. App. 6a. This conclusion was correct. Each alleged violation of law asserted by Petitioner was consummated with the purchase of Fifth Third mutual funds. When Petitioner alleges improper standardized investment strategies, the standardized investment he complains of involved the purchase of Fifth Third funds. When Petitioner alleges breaches

of loyalty, the alleged disloyal act was the Bank's purchase of the Fifth Third mutual funds. The examples are numerous and extensively detailed in the briefs below.

For purposes of Petitioner's application for review, it is abundantly clear from the Opinion below that the Sixth Circuit did not attempt to or actually expand the scope of SLUSA preemption. Indeed, because the alleged wrongdoing "depended" on securities transactions – and did not simply "coincide" with such purchases which would have been sufficient – the Opinion below did not expand preemption under SLUSA but rather fell well within the scope of preemption already firmly established by this Court. Thus, the Opinion below represents a faithful and straightforward application of binding precedent from this Court.

Many other courts have applied the Court's settled precedent with respect to SLUSA concerning claims that a financial institution – while serving as a corporate fiduciary of a trust – improperly invested the trust corpus in mutual funds affiliated with that same financial institution. The courts that have considered the issue have rejected the exact contentions advanced in the Petition and have dismissed the claims on the basis of SLUSA preemption. *See Kutten v. Bank of America,* 530 F.3d 669 (8th Cir. 2008), cert. denied *Arnold v. Bank of America, N.A.*, 129 S.Ct. 598, 172 L.Ed.2d 456, 77 USLW 3130 (Nov. 17, 2008) (NO. 08-333); *Siepel v. Bank of America, N.A.*, 526 F.3d 1122 (8th Cir. 2008); *Stoody-Broser v. Bank of America N.A.*, No. C 08-02705 JSW, 2009 WL 2707393 (N.D. Cal. Aug. 25, 2009); *Rabin v. JP Morgan Chase Bank, N.A.*, No. 06 C 5452, 2007 WL 2295795 (N.D. Ill. Aug. 3,

2007); *Spencer v. Wachovia Bank, N.A.*, No. 05-81016, 2006 WL 3408043 (S.D. Fla. May 10, 2006); *Wells Fargo Bank, N.A. v. Superior Court of San Francisco County*, 71 Cal.Rptr.3d 506 (Cal. App. 2008).

For example, the *Siepel* plaintiffs alleged that "the Bank purchased securities as a trustee on their behalf without disclosing that the Bank profited from the transactions." 526 F.3d at 1127. They argued that SLUSA did not apply because "the non-disclosure did not relate to a decision whether to purchase a security." *Id.* Citing *Dabit*, the Eighth Circuit concluded that the alleged nondisclosures "clearly coincided with the Bank's purchase of shares in the Nations Funds mutual fund. Given the identical coverage of Section 10(b) and SLUSA, it follows that the Plaintiffs' state-law claims are preempted." *Id.*

The claims in *Kutten* were "nearly identical" to those advanced in *Siepel*. *See Kutten*, 530 F.3d at 669-71. So too are Petitioner's claims in the Amended Complaint, as described in Fifth Third's Motion to Dismiss. *See* R. 22. Notably, this Court found no compelling reason to review the decision in *Kutten*. *See Arnold v. Bank of America, N.A.*, 129 S.Ct. 598. Other than cases adding to the list of courts that have found such claims preempted under SLUSA, no significant legal developments have taken place since the Court denied the petition for certiorari in *Kutten*.

The decisions of these other courts demonstrate that the Sixth Circuit merely applied settled law in dismissing Petitioner's class claims on the basis of SLUSA preemption. These decisions further prove that Petitioner's principal legal arguments lack support.

Because the Opinion decided the exact issue the same way as numerous other courts, and because the Court has already ruled that it would not review a decision presenting the same factual and legal issues, the Petition should be denied.

### B. There is No Circuit Split Related to the Application of *Dabit* and SLUSA Preemption that Could Justify Granting the Petition

Petitioner argues that the Opinion creates a circuit split on three separate issues. Petitioner's attempt to demonstrate conflict among the circuits is based on inaccurate descriptions of case holdings and the refusal to acknowledge the existence of other cases whose holdings are consistent with the Opinion. Any reasonable review of the authorities cited in the Petition reveals no split among the circuits.

#### 1. Contrary to Petitioner's Claim, There is No Split Among the Circuits Concerning Whether Detrimental Reliance is an Element of SLUSA Preemption.

Petitioner first claims that the Sixth Circuit's Opinion conflicts with circuits that find preemption only where a plaintiff detrimentally has relied on misrepresentations, omissions, or manipulations of the defendant, or there is a causal connection between the alleged fraud and a securities transaction. As discussed above, this argument is foreclosed by *Dabit*. *See Dabit*, 547 U.S. at 85 ("it is enough that the fraud alleged "coincides" with a securities transaction - whether by the plaintiff or by someone else").

Contrary to Petitioner's claim, there is no circuit split on this issue.

In the Opinion, the Sixth Circuit addressed Petitioner's contention, observing that the SLUSA statute did not contain a reliance requirement. Pet. App. 10a. In doing so, the Sixth Circuit joined a long list of decisions specifically rejecting the proposition that reliance, or some other element of a private right of action under § 10(b), must be shown for SLUSA to apply. *See, e.g., Anderson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 521 F.3d 1278, 1285-86 (10th Cir. 2008) (collecting cases rejecting Petitioner's argument). Petitioner can not meaningfully explain why his argument is correct when so many courts have found reliance not to be an element of SLUSA and when numerous courts have determined that claims by trust beneficiaries arising in the exact context as the present are preempted.

Moreover, Petitioner can cite no case specifically holding that reliance is a required showing for the application of SLUSA, nor can Petitioner identify a case where SLUSA preemption did not apply based on the absence of reliance. Petitioner relies on *Green v. Ameritrade*, 279 F.3d 590, 598 (8th Cir. 2002)[4] in

---

[4] Petitioner labels his citation on page 22 of the Petition as "*Santa Fe*," perhaps leaving the reader with the impression that one of the Court's decisions supports his argument. But this language appears nowhere in the Court's *Santa Fe* decision. Rather, the quoted language and the Federal Reporter citation refer to the

support of his reliance argument. But *Green* was superseded by *Dabit*, and the Eighth Circuit recently repudiated its earlier interjection through *Green* of reliance into the SLUSA analysis, stating:

> When it rejected the *Blue Chip Stamps* limitation, the Supreme Court rejected wholesale the proposition that limitations on private Rule 10b-5 actions may be applied to limit the scope of SLUSA. To the extent that we have suggested, pre-*Dabit*, that the scope of SLUSA preemption is equal to that of the right to a private Rule 10b-5 action, *see Green*, 279 F.3d at 597-98, *the [Supreme] Court has corrected our course*.

*Siepel*, 526 F.3d at 1127 (emphasis added) Petitioner's reliance on Green is misplaced.

Petitioner also argues that this Court's decision in *Stoneridge* supports his contention that reliance is a part of the SLUSA analysis. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008). But *Stoneridge* is not a SLUSA case. Petitioner knows as much and thus he had to resort to rewriting the Court's decision. He cited the following sentence from *Stoneridge*: "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the § 10(b) private cause of action." Pet. 23. But in the Petition, he removes the phrase "the § 10(b) private cause of action." *Id.* The import of Petitioner's citation to *Stoneridge* cannot be overstated. No

---

Eighth Circuit's decision in *Green*, a case overruled by *Dabit* and rejected in its own circuit.

SLUSA case supports his position, so he is forced to rely on (and misstate) a § 10(b) case; but *Dabit* specifically teaches that SLUSA preemption is not limited to those facts and claims that might be an actionable § 10(b) claim. Not only does the Petition fail to demonstrate any conflict among circuits, but Petitioner's legal arguments are unfounded.

In a twist on the same unsupportable theme, Petitioner further argues the Sixth Circuit broke with circuits that require a "causal connection" between the alleged fraud and the securities transaction. There is no circuit split on this issue for two reasons: (1) the Petitioner misstates the holdings of the cases he relies on and (2) the Opinion does not conflict with any of these decisions.

Petitioner attempts to rely on *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 877 (8th Cir. 2006). But the language Petitioner relies on from *Sofonia* is from the Eighth Circuit's earlier decision in *Green*; and as discussed above, the Eighth Circuit in 2008 specifically rejected its *Green* holding, recognizing that this Court corrected the course it erroneously had set in *Green*. *Siepel*, 526 F.3d at 1127. Petitioner's claim that there exists a conflict between the Sixth and Eighth Circuits on this issue is false. The Opinion below is entirely consistent with the Eighth Circuit's post-*Dabit* holdings in both *Kutten* and *Siepel*.

Similarly, the Sixth Circuit's Opinion does not conflict with either the Seventh or Second Circuits. In *Gavin v. AT&T Corp.*, 464 F.3d 634, 639-40 (7th Cir. 2006), the Seventh Circuit found that SLUSA did not preempt the plaintiffs' claims because the alleged fraud was not "in connection with" the securities

transaction when the alleged fraud occurred months after the securities transaction. This is far different from the present case, in which the District Court held, and the Sixth Circuit affirmed, that the fraud is so interconnected with a securities transaction that the wrongdoing "depend[s]" on the purchase of the Fifth Third funds. Opinion, Pet. App. 6a. And, in *Ring v. AXA Fin., Inc.*, 483 F.3d 95, 98 (2d Cir. 2007), as even Petitioner acknowledges, the issue was whether a particular insurance rider was a covered security, an issue wholly irrelevant to the present case where there is no dispute that the Fifth Third funds are covered securities. Indeed, the *Ring* court specifically stated it would not consider arguments concerning the "in connection with" factor. *Id.* ("Because we conclude that the [insurance rider] is not a 'covered security,' we need not address SLUSA's 'in connection with' requirement.").

The Petition also claims that the Opinion conflicts with the Ninth Circuit's decision in *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208 (9th Cir. 2009). But *Proctor* is not remotely in conflict with the Sixth Circuit's Opinion. There was only one covered class action claim in *Proctor*, and the Ninth Circuit relied on the district court's opinion, finding that claim preempted by SLUSA. *Id.* at 1211-22 n.13. Moreover, despite Petitioner's attempts to demonstrate otherwise through questionable quotations from *Proctor*, the Ninth Circuit did not remotely establish a standard for SLUSA preemption that is any different than the *Dabit* standard relied upon by the Sixth Circuit. *Id.* at 1226 (class claim preempted "because [n]o covered class action [that alleges a misrepresentation of material fact in connection with the sale of a covered

security] based upon the . . . law of any State . . .may be maintained in . . . Federal court.").

Finally, Petitioner claims that the Opinion is in conflict with the Third Circuit's decision in *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), which held that SLUSA preemption does not apply where the alleged misrepresentation is merely an extraneous detail. The Opinion does not conflict with *LaSala* because the misrepresentations alleged in the Amended Complaint here are not "extraneous details." Without the purchase of the Fifth Third mutual funds, there would be no claim at all.

Petitioner's arguments regarding *LaSala* hardly establish a compelling issue for the Court to review. As the Opinion below makes clear, the language from *LaSala* relied on by Petitioner is plainly *dicta*. *See* Opinion, Pet. App. 9a. So too is the Opinion's discussion of *LaSala* – the Sixth Circuit's decision does not rest on the fraudulent allegations in the Amended Complaint being immaterial, as it found the wrongdoing was dependent on both fraud and a securities transaction. In the Opinion, the Sixth Circuit squarely found that Petitioner's claims "depended" on his allegations of fraud and misrepresentation (even though he had removed those words from his Amended Complaint). Opinion, Pet. App. 6a. Therefore, the *holding* of the Opinion does not conflict in any way with *LaSala* and there is certainly no compelling issue for the Court to review.

### 2. There is No Circuit Split Regarding a Plaintiff's Right to Artfully Plead Around SLUSA

Petitioner claims that the Opinion is in conflict with those circuits that may allow plaintiffs to "plead around" SLUSA. Again, Petitioner's alleged circuit split is illusory.

Petitioner objects that the Sixth Circuit disregarded the specific words and labels utilized in the Amended Complaint and instead looked to the "substance" of the allegations. Opinion, Pet. App. 7a. The Sixth Circuit stated that to accept the labels and words chosen by a plaintiff "would reduce [SLUSA enforcement] to a formalistic search through the pages of the complaint for magic words – 'untrue statement,' 'material omission,' 'manipulative or deceptive device' – and nothing more." *Id.* The Sixth Circuit correctly concluded that a claimant "cannot avoid [SLUSA's] application through artful pleading that removes the covered words from the complaint but leaves in covered concepts." *Id.*

The Sixth Circuit did not break new ground in looking past the labels used by the a plaintiff to determine if the true substance of a complaint implicates SLUSA. Indeed, the notion that the plaintiff's labels and words are disregarded in pursuit of the gravamen of the plaintiff's complaint is a settled proposition throughout SLUSA jurisprudence. *See, e.g., Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004); *Siepel*, 526 F.3d at 1127, *aff'g*, 239 F.R.D. 558, 570-72 (E.D. Mo. 2006); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 879 (8th

Cir. 2002); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002); *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 692-93 (S.D.N.Y. 2006).

The cases cited by Petitioner do not compel an opposite conclusion. Certainly no case cited by Petitioner breaks with the Sixth Circuit's primary holding or otherwise supports the notion that a plaintiff can avoid preemption as long as the plaintiff avoids including in the complaint certain key words.

In support of the argument that a plaintiff can avoid SLUSA preemption through artful pleading, Petitioner cites *Beckett v. Mellon Investor Services, LLC*, No. 06-36044, 2009 U.S. App. LEXIS 10335 (9th Cir. May 14, 2009), an unpublished decision from the Ninth Circuit in which the court – after finding that the claims were preempted – allowed the plaintiff to amend the complaint to assert claims that might possibly be stated without including covered allegations. But *Beckett* was a Rule 15 decision permitting amendment of a complaint to plead claims that substantively were not implicated by SLUSA. *Beckett* does not stand for the proposition that a plaintiff can avoid SLUSA preemption via artful pleading where the substance of the claims are in fact implicated by SLUSA.

There is no conflict between the Ninth and Sixth Circuits on this issue of whether artful pleading is permitted. Indeed, the Ninth Circuit unequivocally has stated that artful pleading cannot defeat SLUSA preemption, in a case cited by Petitioner. *U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 842 (9th Cir. 2007). *Saxton* states that SLUSA "stands as an

express exception to the well-pleaded complaint rule, and its preemptive force cannot be circumvented by artful drafting." *Id.*

Petitioner claims that the Opinion's analysis of SLUSA allows any claim to be recast into one of fraud. This is simply not true. There are countless examples of allegations where, regardless of the labels in the complaint, fraud in connection with a security is not the gravamen of the claim. For example, when "after a lawful transaction had been consummated, a broker decided to steal the proceeds and did so." *Zandford*, 535 U.S. at 820.

Moreover, accepting Petitioner's argument regarding artful pleading means, effectively, a judicial repeal of SLUSA; no claim would ever again be preempted if avoiding SLUSA could be accomplished by simple avoidance of a few specific failing to include a few key words in a complaint. This could hardly be what Congress intended in targeting abuses of litigation concerning securities. *Dabit*, 547 U.S. at 81-82. And such an interpretation would fail to respect the broad construction of SLUSA already mandated by this Court. *Id.* at 85.

In any event, Petitioner does not and cannot establish any conflict among the circuits on the issue of whether SLUSA may be avoided by artful pleading.

### 3. This Case Does Not Present a Circuit Split on Whether SLUSA Preempts Individual Claims or Entire Actions

Petitioner also argues that the Sixth Circuit's dismissal of the entire action here conflicts with other circuits that examine complaints on a claim-by-claim basis.

Petitioner's argument on this issue is a red herring. The decisions of the District Court and the Sixth Circuit below did not turn on one specific claim being subject to preemption thus requiring dismissal of the entire action (including non-preempted claims). Rather, the two opinions below demonstrate that each claim was based on allegations that are preempted by SLUSA. *See* Opinion, Pet. App. 9a-11a; D. Ct. Order 19a-20a ("...it is inescapable that the key conduct underlying *all the claims* is the Bank's misrepresentations or omissions about, or deceptive scheme involving, the Bank's purchase of its proprietary mutual funds with fiduciary assets.") (emphasis added). Moreover, each cause of action incorporates all of the factual allegations. Opinion, Pet. App. 5a. Petitioner's incorporation of each fact into each cause of action makes a "claim by claim" review of the Amended Complaint impossible. *Anderson*, 521 F.3d at 1287 n.6; *Miller*, 391 F.3d 698 at 702.

Both the District Court and the Sixth Circuit were undoubtedly correct in holding that each claim in the Amended Complaint is preempted by SLUSA. Fifth Third extensively demonstrated why in its briefs below. In short, each claim relies on (sometimes veiled) allegations of misrepresentations, omissions,

present case where there is no dispute that each claim is a covered class action seeking damages. *See* Opinion, Pet. App. 4a-5a.

Because each claim in the Amended Complaint is subject to preemption, and each allegation is incorporated through the Amended Complaint, there is no split among the circuits to justify this Court's review of the Opinion. While Petitioner clearly objects to the Sixth Circuit's determination that each claim was preempted by SLUSA, the Sixth Circuit's application of settled legal principles to the specific allegations contained in the Amended Complaint is not a compelling or important legal issue requiring this Court's review or consideration.

### C. The Sixth Circuit's Decision Does Not Interfere With State Trust Law

Petitioner's final argument is that the Sixth Circuit's Opinion impermissibly interferes with state trust law and eliminates a trust beneficiary's recourse against malfeasance by a trustee. This argument has been rejected by *Dabit* and numerous other courts.

As this Court, and the Sixth Circuit and District Court have recognized, it is important to recall that SLUSA does not preempt any right or cause of action held by a trust beneficiary:

> SLUSA does not actually preempt any state cause of action. It simply denies plaintiffs the right to use the class-action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any group of

> fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist.

*Dabit*, 547 U.S. at 87. *See also* Opinion, Pet. App. 10a; D. Ct. Order, 17a-18a. Moreover, the Court has recognized that Congress "did not by any means act 'cavalierly'" in enacting SLUSA given the tailored exceptions (not applicable here) to SLUSA's preemptive scope. *Id.* Finally, the Court recognized in *Dabit* that concerns of federalism and the displacement of state law carry little merit with respect to SLUSA when federal law has been the "principal vehicle" for asserting fraud claims related to securities. *See also Saxton*, 494 F.3d at 843-45; Opinion, Pet. App. 10a ("SLUSA leaves open many avenues for claimants like Segal to vindicate their rights.").

Thus, this Court – in *Dabit* – already has considered and resolved Petitioner's exact concerns with respect to federalism and alleged infringement on state law. The Opinion applied the Court's established jurisprudence in holding that Petitioner's class claims were preempted; in doing so, the Sixth Circuit observed that even though his class action claims were preempted by SLUSA, Petitioner had numerous options remaining: (i) pursuing his individual claims; (ii) alleging claims on behalf of a group less than 50; (iii) proceeding pursuant to the requirements, *or* (iv) filing a claim without covered allegations. Opinion, Pet. App. 10a-11a. Under these circumstances, Petitioner again presents no compelling issue for review by this Court.

## *Conclusion*

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully Submitted,

Patrick F. Fischer
*Counsel of Record*
Joseph M. Callow
Rachael A. Rowe
Brian P. Muething
Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
Tel: 513-639-3814
Fax: 513-579-6457
pfischer@kmklaw.com